No. 19 —

Brf. of Mason & Springer

Office Supreme Court U. S.
FILED
OCT 15 1901
JAMES H. Mc

Supreme Court of the United States

Filed Oct. 15, 1901.

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

JAMES M. MASON,
CHAS H. NEARING,
Att'ys for Pff's in Error.

WM. M. SPRINGER,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

STATEMENT.

The suit is one of ejectment, originating in the District Court of Wyandotte County, Kansas. The answers were general denials and a plea of both the three and fifteen year statute of limitation; a jury was waived and the cause submitted to the Court, sitting as a jury. Judgment was rendered for the defendant, an appeal taken to the Supreme Court of the State of Kansas, which Court affirmed the judgment of the lower Court. The cause was then brought to this Court by a writ of error. The facts are as follows: One Carey Rogers was an incompetant Wyandotte Indian, being an orphan, and was allotted, under the treaty of 1855, the land in controversy, which was conveyed to him by patent, dated September 1, 1859, which patent contained the usual clauses against alienation and subject to condition of fourth article of treaty of 1855, (pages 12-13 record.) The record also contains the patent and finding of fact pertaining to another tract of land, patented to Margaret A. Charloe, the grandmother of Carey Rogers, which subsequently descended to

him. (Page 8 record.) Settlement of this property has since been made, it is not now involved in the case.

The only property and facts now in question is that described in and pertaining to the patent of September 4, 1859, (pg. 12-13), abstract. On November 15, 1864, Carey Rogers, who was then 18 years of age, (finding of fact, question 20, pg. 20 record,) conveyed the property in question to grantors of defendants who thereafter entered into possession of the same.

This deed was never approved by the Secretary of Interior, Carey Rogers died in 1867, leaving plaintiffs Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr. and Mary D. Williams, his sole surviving next of kin following the male line. (Question 32, pg. 20, record.)

On April 4, 1877, Lucy A. Charloe, Jane Sarahess and others, executed and delivered to Byron Judd a deed to the property in question, (pg. 19 record.) On September 27, 1877, Byron Judd and wife executed deed to Mary E. Stockton who subsequently executed deed to defendant.

The court found the grantors to this deed were not the next of kin of Carey Rogers following male line question, (33 pg. 20, abstract.)

The trial court made the following finding of fact pertaining to the possession of the property in question (paragraph XIII, pg. 17, record.)

"Immediately after the execution of said deed from said Carey Rogers to Jesse Cooper and Mary E. Stockton of date August 31, 1863, (this being to property not now involved,) and November 15, 1864, said grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds, and make per-

manent improvements thereon and they and their grantees have had and held open, peaceable, quite, undisturbed, actual notorious, exclusive and adverse possession of all said lands except as shown in finding no 15 claiming title thereto ever since the date of said deeds and have paid all taxes, cleared said land of timber and cultivated the same by tenants.

XV. On the first of March, 1891, there was no building or residence upon the property in controversy, the residence which had been upon the same having been destroyed by fire. The land in controversy was not cultivated that year by the defendants, except a portion, some 15 or 20 acres in the northwest corner thereof, which was leased in writing from the defendants. Upon the north half of the land in controversy, one James M. Mason, claiming to represent the plaintiff as their agent and attorney, made a lease in writing in the first day of March, 1891, to Jay Ikler and Adam Berlin to the land in controversy in this action and by virtue thereof, said Ikler and Berlin executed leases to certain other persons to certain portions of said tract and said Jay Ikler and Adam Berlin and their subtenants, during the spring of 1891 plowed and planted about 35 acres of said land, and after the same was planted, there was a rise in the river and a portion of the land was overflowed so that very little crops was raised during the year subsequent to the overflow, and late in the summer Adam Berlin sowed millet and raised a crop thereof upon about ten acres; also one Davis sowed some millet, but there was for some reason no result therefrom, and it is disputed whether Davis cultivated what he did under the plaintiffs or defendants, he probably at different times verbally

recognized both parties as his landlord, but no person received rent from him.

"All that Davis cultivated as well, as a portion of that cultivated by the other persons who occupied under the lease made by Mr. Mason, was on a portion of the land that was leased by defendants to A. M. Willetts. Neither Mason or any tenant claiming through him under the plaintiffs, occupied or cultivated any portion of said land at any time except as above stated. In 1892 one person claiming under the plaintiffs attempted to plow thereon but was prevented by the defendants.

The defendants claimed possession by virtue of the deed from Carey Rogers above referred to, also a deed to one Byron Judd, dated April 4, 1877. but the deed to Judd was not executed by the heirs of Carey Rogers (see finding of fact, question 33, pg. 20, abstract.)

"The Supreme Court of Kansas held (page 33 record) that the deed by Carey Rogers to grantees of defendant were void. By the treaty of 1867 ratified in 1868, all restrictions of voluntary alienation of land patented to incompetents were removed. As to conveyances already attempted the Secretary of the Interior was authorized to make inquiries and confirm, modify or set aside the sales. It does not appear in this case that any action was ever taken by him in reference to this land. The state of the case then, at the time this treaty took effect, was that the lands belonged to the heirs of Carey Rogers and were alienable by them. The defendants were in possession claiming a title which they did not have. This possession remained undisturbed for more than twenty years. We see no reason why the statute of limitation does not bar this action."

ASSIGNMENT OF ERRORS.

1st. The court erred in sustaining the trial court in the following finding, (the same being the XIV.) The defendants and the grantor acted in good faith in making the purchase of said lands and in taking the deeds thereto of date August 31, 1863 and November 15, 1864, April 14, 1877.

II.

The court erred in holding that the grantees of Carey Rogers took anything from such convevance upon which a title by prescription or limitation could be based.

III.

The court erred in sustaining the trial court That the treaty of 1867 modified the treaty of 1855 in regard to alienation of said land patented to incompetent Indians and applied to the property in question.

IV.

The court erred in holding the statute of limitation of the State of Kansas applied to the land in question and was a bar to this claim.

POINTS AND AUTHORITIES.

I.

Plaintiff being Indian are not subject to statute of limitation.

McGannon vs. Straightlege,	32 Kan. 524.
Sheldon vs. Donohue,	40 " 346.
O'Brien vst Bugbee,	46 " 1.
Gibson vs. Choteau,	80 U. S. 92.
Kansas Indians,	72 " 737.
Stevens vs. Smith,	77 " 321.

II.

That the deed from Carey Rogers of November 15, 1864, (pg. 13 record,) under which defend ant hold is void not having been approved by the Secretary of Interior.

III.

That said deed will not constitute sufficient color of title to enable defendants to claim adverse possession.

Gibson vs, Choteau,	13 Wall. 99.
Irvin vs. Marshall,	20 How. 558.
Gibbs vs. Gas Co.,	130 U. S. 412.
Livingston vs. The Peru Ice Co.,	9 Wend. 511.
Taylor vs. Brown,	5 Da. 343.
Zeller vs. Eckhart,	4 How. 389.
Libby vs. Clark,	118 U. S. 250.
Smythe vs. Henny,	41 Fed. Rep. 705.
Diffenback vs. Hawes,	115 U. S. 423.

III.

No additional rights accured to defendants by the death of Carey Rogers.

IV.

No title by prescription or limitation under any state statute could be acquired as against the right of the Secretary of the Interior to investigate and modify or declare void the conveyance in question; hence the state of limitation could not begin to run, if at all, until after such action by the Secretary of Interior.

Gibson vs. Choteau, 13 Wall. 99.

V.

The delay of the government in acting on the property in question is a matter for which plaintiffs are not responsible.

Gibson vs. Choteau, 13 Wall. 99.

VI.

Plaintiffs being heir of Carey Rogers inherit the property in question.

Opin. Supreme Court, Kans., page 32 record.

Complied Law Kans., 1862 Ch. 80, Sec. 18 and 19.

ARGUMENT.

I.

Will the statuute of limitation run against plaintiffs.

This depends upon their status whether they had become citizens under the treaty of 1855 or were wards of the nation, dependent upon the government for protection and support. The record is silent on that point and it must be determined by the treaties, and the rules as to presumption established by the courts.

The treaty of 1855, Art. 1 states.

"The Wyandotte Indians having become sufficiently advanced in civilization and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and relations with the United States, as an Indian tribe shall be dissolved and terminated, on the ratification of this agreement except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein, and from and after the date of such ratification, thesaid Wyandotte Indians, and each and every one of them, except as herein after provided, shall be deemed and are hereby declared to be citizens of the United States to all iutents and purposes, and shall be entitled to all the right, privileges, and immunities of such citizens and shall in all respect be subject to the laws of the United States and the Territory of Kansas in the same manner as other citizens of said Territory and the jurisdiction of the United States. and of said Territory shall be extended over the Wyandotte Country in the same manner as other parts of said Territory. But such of the said Indians as may so desire and make application accordingly to the commissioner herein provided for, shall be ex-

empt from the immediate operations of the proceeding provisions extending citizenship to the Wyandotte Indians and shall have continued to them the assistance and protection of the United States, and an Indian agent in their vicinity, for such limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian affairs, and on the expiration of such period or periods, the said exemptions, protections and assistance shall cease, and said persons shall then also becomecitizens of the United States, with all the rights and privileges, and subject to all the obligations above stated and defined."

The foregoing treaty might justify the presumption plaintiffs were citizens of the United States, had it been carried out. Upon the dissolution of the tribe there could have been no further treaties with them, but the government did recognize and treat with them in 1867, which treaty in its preamble states. "A portion of the Wyandotte, parties to the treaty of 1855, although taking lands in severally, have sold said lands and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization while others who did became citizens, are unfitted for the responsibilities of citizenship. And, whereas, the Wyandottes treated with in 1855, have just claims against the government, which will enable the portion of their people wherein referred, to begin a new tribal existence. Therefore, it is agreed.

"Art. 13. The United States will set apart for

the Wyandottes, for their future home, the land ceded by the Senecas in the first article hereof and described in said article to be owned by the said Wyandottes in common. And the Secretary of the Interior is hereby authorized and required to appoint three persons whose duty it shall be to ascertain and report to the department the amount of money if any, due by the United States to the Wyandotte Indians under existing treaty. Stipulations and the items mentioned in schedule "A" appended to this treaty, and the report of the persons so appointed, with the evidence taken, shall be submitted to Congress for action at its next session. Aregister of the whole people resident in Kansas and elsewhere, shall be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, on or before the first of July, 1867, which shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans as described by treaty of 1855, and all such persons and those only shall hereafter constitute the tribe."

By this treaty the government recognized the fact that the treaty of 1855 had not been carried out, the Wyandotte Indians had not become citizens or at least maintained sufficient tribal organization as to enable the government to treat with them through their representatives and not in severalty That they had not "*not been compelled to become citizens*," That the were still poor and while, some had become citizens, they were unfitted for the responsibilities of citizenship and then settled all

questions of tribal existence by re-establishing the tribe. This being true we feel this court would be justified in or extending to them the protection given to other tribal indians.

If plaintiffs had become citizens, and become sufficiently civilized to care for themselves, their condition was the exception to that recognized by the treaty of 1867, and the burden was upon the defendants to show they were within that exception.

That, being tribal Indians or unable to assume the responsibility of citizenship, no statute of limitation will run against them is so clearly established as to need neither discussion nor authorities.

II.

That the deed from Carey Rogers of November 15, 1864, (page 13, record,) under which defendants hold, is not having been approved by the Secretary of the Interior will not be disputed.

III.

That the same will not constitute sufficient color of title to enable defendants to claim adverse possession is equally well established.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.
Gibbs vs. Gas Co., 130 U. S. 412.

Taylor vs. Brown, 6 Da. 339.
Ziller vs. Eckhart, 4 How. 389.
Libby vs. Clark, 118 U. S. 250.
Smythe vs. Henry, 41 Fed. Rep. 706.
M. Gibbs vs Gas Co., 130 U. S. 412.

This court adopts the rule in Man. It states: "The rule of law said Parker C. S. in Russell vs. DeGrand 15 Mass. 35, 39, is of universal operation, that none shall, by the aid of a Court of Justice, obtain the fruits of an unlawful bargain."

No adverse possession can be founded upon a possesion under a deed obtained by fraud or where there is an express pronibition of alienation so that the deed is absolutely void.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.

In case of Taylor vs. Brown, 5 Da. 344, the court states:

"In the case at bar the appellant Brown" came into the possession of the land under a deed that its owner had nopower to make, and, as the findings of the court show, he knew his grantor was an Indian at the time of the transaction, and therefore he is to be held to have known, at leastin legal effect, of the disability resting on his grantor at the time of the pretended conveyance, for all persons are persumed to know the law. We cannot. therefore, say that he was in possession in good faith, under color of title. To hold otherwise would defeat the evident intention of the statute, and permit the ap-

pellant Brown, with the law staring him in the face, to initiate a species of deed aud color of title, which would in effect nulify and defeat the protection sought to be thrown around this Indians by the government, and to abrogate the conditions upon which the government parted with its title to the land.

IV.

The grantors of Carey Rogers did not take in good faith the patent to him, contained the limitation upon his alienation of the property, they knew that he was an incompetent Indian and had no right to convey. They did not enter into possession of the property with any reason for belief that their possession would open into a holding. They new the deed under which they claimed was void without the approval of the Secretary of the Interior. They could not hope to circumvent the treaty and obtain title by possession which they could not obtain under the law. No state legislation could abridge the right of the government through its proper office to approve or disapprove these conveyances Gibson vs. Choteau, 13 Wall. 99. Their possession was an absolute nullify so far as confering any right was concerned unless they acquired additions rights upon the death of Carey Rogers or by the treaty of 1867.

No additional rights accured to defendants by the death of Carey Rogers. They acquired nothing thereby and the only question whether his heirs took the property subject to the same conditions and limitations as held by him. If they were tribal In-

dians or otherwise incompetent, then they are entitled to the same protection and subject to the same limitations as Carey Rogers himself, their status would be unchanged, and no possession for any period of time would ripen into a title. There is no provision in the treaty of 1855, whereby property patented to an incompetent Indian is relieved of the limitation upon its alienation upon its passing into the possession of a competent Indian or a citizen. Even if these heirs were citizens the property is subject to the same limitation until relieved by act of Congress.

In Maynes vs. Veale, 20 Kan. 374. It is held "There is nothing in the powers conferred by citizenship independent of the treaty, which of themselves, releases the restrictions upon alienations and if these restrictions are discharged when the allotters become citizens, such discharge or release must be found in some of the treaties."

This being an action at law no question of laches can arise.

V.

The remaining question is whether or not the treaty of 1867 is retractive. Its language as well as the authorities would seem to indicate it was not. The provislon in the treaty is as follows:

Art, 16. "All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any

court or otherwise for or on account of any claim, judgment execution or order or for taxes until voluntarily sold to the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

It is not contended that Carey Rogers or his heirs, made any conveyances after the treaty of 1867, it must be conceded that up to that time defendants or their grantor had acquired no rights to or intesest in the property in question, either by grant or otherwise. If in 1867 defendant had been in possession of the property in question for the statutory period of 15 years or any other period the State of Kansas might have enacted, it will not be claimed they had then acquired a title thereto.

If at that time the statute of limitations had commenced to run then they might have acquired a title and asserted the same against the action of the Secretary of the Interior if he had attempted to modify the sale as provided in the treaty of 1867. That this could not be done needs no discussion.

The treaty was not retroactive, Smith vs. Stevens, 10 Wall. 327. This court held: "It is

hardly necessary to say that a joint resolution passed nearly two years after the transaction, cannot relate back and give validity to a conveyance which. when executed, was void, nor have we any reason to suppose that Congress contemplated any such effect, would be claimed for its legislation on the subject."

The only right in the property defendants can claim is that given by the treaty of 1867, and that right is· "That a thorough examination and report shall be made under direction of the Secretary of the Interior in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid or declared such sales eutirely void, as the very right of the several cases may require.

This has not been done. No investigation of the property has been made, will a state statute limit or prevent the Secretary of State acting in the matter, could the state of Kansas pass a law and provide the Secretary of Interior act in this matter within a year or any other period. If the Secretary of Interior should now investigate said sale and act upon the same and declare it void, could defendants claim adverse possession in controvention of this act, most certainly not.

As held in the case of Gibson vs. Cloteau 13 Wall. 99, with respect to public domains, The constitution vests in Congress the power of disposition and of making all needful rules and regulations. The power is subject to no regulation, Congress has the sole absolute right to prescribe the times,

the conditions and the mode of transferring the property, or any part of it and to designate the person to whom the transfer shall be made. No State legislation can interfere with this right or embarass its exercise.

* * *

The same principle which forbids any State legislation interferring with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted *by reason of any delay* in the transfer of the title after the initiation proceeding for its acquisition."

The consumation of the title is not a matter the grantees can control, but one which rests entirely within the government. With the legal title when transferred, goes the right to possess and enjoy the land and it would amount to a denial of the power of disposal in Congress if these benefits which should follow upon the acquisition of the title could be forfeited because they were not asserted before that title was issued."

In like manner if the Secretary of Interior should upon investigation as provided in the treaty of 1867, declare the conveyance of Carey Rogers void. These plaintiffs, as heirs of Carey Rogers, would be entitled to enjoy and possess the property in question and no State statute can limit such right.

All of which is respectfully submitted.

CHARLES H. NEARING,
JAMES M. MASON,
Attorneys for Plaintiff.

W. M. SPRINGER,
of Counsel.

JOHN SCHURMEIER ET AL.,
Plaintiffs in Error,

v.

No. 19

JOHN P. STOCKTON ET AL.,
Defendants in Error.

In Error to the Supreme Court of the State of Kansas.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.

WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1901

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN SCHRIMPSCHER ET AL.,
PLAINTIFFS IN ERROR,

v.

JOHN S. STOCKTON, ET AL.,
DEFENDANTS IN ERROR.

No. 19.

Supplemental Brief of Plaintiffs in Error.

ERRATA.

The statement, assignment, and brief of plaintiffs in error filed in this case contains quite a number of typographical errors, some of which will be pointed out and corrected.

In line 2, page 3, the word quite should be quiet.

In line 5, of page 7, the word State should be statute.

In line 8, page 13, the word grantors should be grantees.

In line 14, page 13, the word open should be ripen.

There are other errors which the court will readily perceive and which need not be pointed out.

A Question of Statutory Construction.

The decision of the court in this case will largely turn upon the construction which the court will give to the following provisions in the treaty of 1868:

"Art. 16. All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any court or otherwise for or on account of any claim, judgment, execution, or order, or for taxes, until voluntarily sold by the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

This Article is divisible into three propositions:

1. The removal of all restrictions upon the sale of land under the treaty of 1855, after the ratification of the treaty of 1868.

2. Inhibition upon sales of allotted lands for taxes.

3. The status of allotted lands which had been sold between 1855 and 1868, the dates of the ratification of the respective treaties.

As to the first proposition, it is evident that it relates to sales of allotted lands thereafter to be made.

It is a well recognized rule of construction that where the intention as to whether a statute is, or is not, retro-

spective is doubtful, it will be construed as prospective only. (Southerland on Stat. Const., Sect. 463.) In this case there is no room for doubt, for there is an expressed intention to make the statute prospective, that is, to take effect only on sales thereafter to be made. The third proposition above stated clearly establishes this fact. The language of that proposition is to the effect that "many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855." This provision relates to lands which had been sold after the ratification of the treaty of 1855, and before the ratification of the treaty of 1868. As such lands had already been sold, in violation of the spirit and intent of the treaty of 1855, the treaty of 1868 very properly and justly placed such lands in a special class, and as to them it was provided, not that the restriction made by the treaty of 1855 should no longer apply, and that sales already made were validated, but that such lands, so sold in violation of the spirit and intent of the treaty of 1855, should be referred to the Secretary of the Interior, for full examination and hearing of the parties interested; and after such examination and hearing, the Secretary was authorized to do one of three things:

First. To confirm the sales.

Second. To require the vendees to pay an additional amount; or,

Third. To declare such sales entirely void as the very right of the several cases may require.

This provision was notice to all concerned that sales of allotted lands by Wyandotte Indians, belonging to the class denominated "not competent," which were made between 1855 and 1868 and not confirmed by the Secretary of the Interior, were made in violation of the spirit and intent of the treaty of 1855, and that the vendees of such sales must

submit their purchases and their deeds to the Secretary of the Interior. Until such persons complied with this reasonable and just provision of a treaty, which was the law of the land, they were regarded by the provisions of the treaty as holding the lands in violation of the spirit and intent of the treaty; or, in other words, unlawfully and fraudulently. Their holdings could only ripen into *bona fide* titles by a compliance with the provisions of the treaty of 1868. Without such compliance, no adverse possession could be set up, and the statutes of limitation of Kansas could not repeal, alter, or modify the Federal treaty. The Federal statute, the treaty of 1868, is still in full force and effect. The vendees of Carey Rogers are still admonished that their title was acquired in violation of the spirit and intent of the treaty of 1855, and that they can acquire no valid title to such land, unless they comply with the provisions of the treaty of 1868. Such vendees have disregarded this admonition. They knew that only $228 had been paid by them for the tract of land now in controversy in this suit (see Record, page 13), and that in 1898 said tract exceeded in value $5,000 (see Record, page 35). Such vendees knew that the Secretary of the Interior would require them to pay to the heirs of Carey Rogers an adequate and just price for such land, and, in default thereof, that the whole transaction would be declared "entirely void."

The duty of making this showing before the Secretary was imposed by law, the treaty of 1868, upon the vendees of Carey Rogers, from whom the defendants in error in this case now hold the land involved in this suit. They have disregarded the law, and now ask this court to condone their unlawful act, and confirm their fraudulent title.

Until the title of the vendees of Carey Rogers to the land in question becomes perfect, as long as anything is required by a Federal statute or treaty to make such title

perfect, such title is inchoate, and partly in the United States. And it is settled that a statute of limitation will not run against the United States, nor can title by adverse possession be acquired as to lands belonging to the United States in whole or in part

The lands in question were conveyed to Carey Rogers by a patent (see Record, pages 12 and 13), which contained this express provision: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." The court will observe that the restriction as to alienation applied to the grantee and "his heirs." The heirs at law of Carey Rogers are the plaintiffs in this suit, and they cannot now sell it without the consent of the Secretary of the Interior.

The treaty of 1868 did not remove this restriction, or affect this title in any way, except to provide that the grantees of the patentee should submit their title to the Secretary of the Interior. They have not done so. Hence their title remains just as it stood in 1868, the fee being still in the United States, and only a right of occupancy being in the patentee. No State statute of limitation can run as to land held by such a title.

Respectfully submitted.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.